Supreme Court, U.S.
FILED
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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Jon Barton Jacob
Petitioner

Versus

METROLASER, INC.
Cecil Hess, President
Respondent

On Petition For Writ Of Certiorari
To The NEW MEXICO SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

Jon Barton Jacob
8400 Menaul N.E., Suite A-145
Albuquerque,
New Mexico 87112

28 pp

QUESTION PRESENTED

1. Are the imposition of Rule 11 Sanctions, when the Court has no jurisdiction to hear a matter, a violation of 14th Amendment due process, and a violation of a republican form of government guaranteed to each State?

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The Amended Dispositional Order Of Dismissal from the New Mexico Supreme Court appears as Appendix A (pg. A-1); the Certification To The Supreme Court from the New Mexico Court of Appeals appears as Appendix B (pg. A-6); and the Memorandum In Opposition To Calendar Assignment appears as Appendix C (pg. A-8).

JURISDICTION

The order of dismissal of the New Mexico Supreme Court was entered on July 3, 1997. This Courts jurisdiction is invoked under 28 U.S.C. Section 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article IV sec. 4 of the United States Constitution which states in part "The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion".
2. Amendment 14 of the United States Constitution which states in part "nor shall any State deprive any person of life, liberty, or property, without due process of law".
3. N.M.S.A. 35-12-1. Garnishment; affidavit and bond; grounds.... B. Garnishment may be issued in aid of execution of judgment entered in a civil action in the magistrate court only upon the

filing in the action of an affidavit of the plaintiff that the defendant has no property in his possession within this state subject to execution to satisfy the judgment....E. Any magistrate who issues a garnishment in any civil action except in compliance with the provisions of this section is guilty of a petty misdemeanor and shall be removed from office.

4. N.M.S.A. 35-12-19. Garnishment; district court; magistrate court; small claims court. Garnishment may be issued in the district court, magistrate court or small claims court. Sections 35-12-1 through 35-12-18 NMSA 1978 apply to the issuance of garnishment in the district court...
5. NMRA 1-065.2, adopted November 6, 1995 (No. 958300), effective January 1, 1996. Rule 1-065.2. Garnishment. A. Garnishment procedure. After filing of the judgement on the underlying dispute and upon application of the judgment creditor, the clerk of the court shall issue a writ of garnishment.... COMPILER ANNOTATIONS For writ of garnishement, See Form 4-806 SCRA 1986, modified as adopted November 6, 1995, effective January 1, 1996. This form sets forth the necessary recitations mandated by the legislature, with the exception "(application must be sworn to unless signed by an attorney)".

STATEMENT OF THE CASE

On February 27, 1996, Respondent filed an application for writ of garnishment pursuant to Rule 1.65.2 with the District Court clerk of Bernalillo County, New Mexico. Based on this application, a writ of

garnishment was issued. Petitioner timely filed a motion to vacate the writ as no affidavit pursuant to NMSA 32-12-1 was present. Respondent subsequently filed a motion for Rule 11 sanctions and a motion in opposition. In addition, Respondent filed a motion for default judgment against the Garnishee, despite the answer by the Garnishee filed 22 days previously. During the motion hearing, Petitioner clearly pointed out to the district court that the statutes require an affidavit, and that none was filed by the Respondent, which was affirmed by the Respondent. Petitioner continually challenged the court's jurisdiction.

During the motion hearing on April 9, 1996, the court denied Petitioner's motion to vacate writ of garnishment without comment. Respondent's motion to vacate hearing for default judgment against garnishee was granted (garnishee had responded 22 days previous), and Rule 11 sanctions in the amount of 3,500.00 imposed against Petitioner. During sworn testimony, Respondents attorney stated that the intent of the sanctions was to recoup attorney fees during previous appellate court proceedings. NMRA 12-403 only provides for attorney fees during proceedings in the appellate court "if requested in the briefs or by motion filed within ten (10) days of entry of disposition..." No such brief or request was filed by Respondent.

The Notice of Appeal was filed April 15, 1996; the Docketing Statement filed April 17, 1996; the Motion in Opposition to Calendar Assignment on May 14, 1996; the Certification to the Supreme Court by the Appellate Court on May 30, 1996; and the assignment to the general calendar by the Supreme Court on June 14, 1996.

On June 16, 1997, a Dispositional Order of Dismissal was entered by the New Mexico Supreme Court on the grounds that the issue was moot, as no property was turned over pursuant to the garnishment. Petitioner submitted a timely Motion for Rehearing, stating that the issue was not moot due to the issue of Rule 11 sanctions which were appealed on the basis the district court had no jurisdiction to hear the matter. On July 3, 1997, the New Mexico Supreme Court entered a Amended Dispositional Order of Dismissal, stating that the sanctions does not constitute an existing controversy in this instance, and that no arguments regarding sanctions were brought up in either the Docketing Statement or Memorandum in Opposition to Calendar Assignment, and that the issue was therefore deemed abandon. An examination of Petitioners' Docketing Statement and Memorandum in Opposition to Calendar Assignment (Appendix C, pg. A-8, Issue 4 @ pg. 11) clearly shows this issue was preserved and premised on the lack of the courts jurisdiction.

A. GARNISHMENT IS A WHOLLY STATUTORY PROCEDURE IN NEW MEXICO

Garnishment is a specialized form of attachment which allows a person to satisfy a debt owing him from property of his creditor which is in the possession of a third party. Garnishment was not a remedy that existed at common law and in New Mexico the scope of the remedy is purely statutory. Report of the Attorney General, Attorney General Opinion No. 69-85 (August 4, 1969), Joe v.

Marcum, 621 F.2d 358 (10th Cir. 1980). It is settled law in New Mexico that a proceeding in garnishment is wholly statutory, and that compliance with the applicable statutes is essential to confer upon the court jurisdiction of the res, Upjohn Co. v. Board of Commissioners, 25 N.M. 526, 185 P. 279 (1919), Farmers Ins. Exchange v. Ledesma, 214 F.2d 495 (1954)

Garnishment proceedings are controlled by statutes NMSA 1978 Section 35-12-1 to -19 (Orig.Pamp & CummSupp. 1986), Jemko, Inc. v. Liaghat, 106 N.M. 50, 738 P.2d 922 (N.M.App 1987), and in New Mexico, Section 35-12-19 expressly invests district courts with jurisdiction to issue writs of garnishment relating to matters pending in their courts in accordance with Sections 35-12-1 to -18. Jemco, Inc. v. Liaghat.

A properly filed affidavit for the writ of garnishment is indispensable for the exercise of these statutory powers, and unless this affidavit is filed, the court proceeds without jurisdiction and the resulting judgment is void. Ins. Co. Of North America v. Issett, 269 N.W.2d 301 (Ct.App.Mich. 1978). Technical defects in an affidavit supporting garnishment are occasionally subject to waiver. Fildew v. Stockard, 239 N.W. 868, 256 Mich. 494 (1932), Sherry Lane Nat. Bank v. Bank Of Evergreen, 269 N.W.2d 301 (Tex.App. -Dallas 1986). In Gottesman v. Toubin, 353 S.E.2d 294 (Ct.App. Texas 1962), it was reasoned that the insufficiency of the affidavit can be waived by failing to file a motion to quash the proceedings, and that in that situation, the defect in the affidavit is not fundamental or jurisdictional. The legal right to service of a copy of the writ of garnishment, the application, accompanying affidavits and orders of

the court is a primary legal right of the judgment debtor, Sherry Lane Nat. Bank v. Bank Of Evergreen, and it is a fundamental rule of law that only the person whose primary legal right has been breached may seek redress for an injury. Nobles v. Marcus, 533 S.W. 2d 923, (Tex. 1976). Petitioner has waived no such legal right, and expressly complained to the Court. Thus, the fundamental and jurisdictional defects of the affidavit have not been waived.

B. SUPERVISORY POWER OF JUDICIAL BRANCH IS NOT A GRANT OF LEGISLATIVE POWER.

The power of superintending control is the power to control the course of ordinary litigation in inferior courts, State v. Roy, 40 N.M. 397, 60 P.2d 646 (1936). It cannot be appealed to, and a remedy had under it, as a matter of course. In re Weston, 28 Mont. 207, 72 P. 512. Supervisory power is interstitial in the sense that it applies only when there is no effective alternative provided by rule, statute, or constitutional clause, Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed2d 27 (1991), and must be exercised with restraint and circumspection, both because they are shielded from direct democratic controls, and because of their very potency, U.S. v. Horn, 29 F.3d 754 (1st Cir. 1994). Here, the New Mexico legislature has succinctly stated that an affidavit submitted by the plaintiff is a jurisdictional prerequisite to invoking the courts power to issue garnishments, and that failure of the magistrate or district court judge to explicitly follow these procedures are to result in petty misdemeanor charges and removal from office.

C. JUDICIAL BRANCH HAS NO JURISDICTION TO IGNORE A DULY ENACTED STATUTE

The power to make law is reserved exclusively to the legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void, State v. Roy. Courts are not free to construe unambiguous legislation; they may not read language into a statute that is not there, Hansman v. Bernalillo County Assessor, 95 N.M. 697, 625 P.2d 1214 (Ct.App. 1980). As the legislature has no power to interfere with the judiciary in matters regarding pleading, practice and procedure, Ammerman v. Hubbard Broadcasting Inc., 89 N.M. 307, 551 P.2d 1354 (1976); quo warranto, State ex rel. Anaya v. McBride, 88 N.M. 244, 539 P.2d 1006 (1975); appellate procedure, Ammerman v. Hubbard Broadcasting Inc.; time of hearing appeals for court, Ammerman v. Hubbard Broadcasting Inc.; bar admission requirements, In re Sedillo, 66 N.M. 267, 347 P.2d 162 (1959); and other matters falling under the power of the judiciary, it is no less true that the judiciary has no power to ignore the express will of the people through duly enacted legislation. A general rule-making power under the Constitution cannot take precedence over specific jurisdictional statutes.

D. WHERE RULE 1-065.2 IS IN CONFLICT WITH NMSA 35-12-1 AFFIDAVIT REQUIREMENTS, THE RULE MUST FAIL

Rule 1-065.2, adopted November 6, 1995 (No. 95-8300), effective January 1, 1996, set forth a new method of implementing a garnishment proceeding in that the affidavit requirements mandated

in NMSA 35-12-1 were effectively waived if the proceeding were performed by an attorney. In part, Rule 1-065.2 states that:

> Rule 1-065.2 GARNISHMENT; A. Garnishment procedure. After the filing of the judgment on the underlying dispute and upon application of the judgment creditor, the clerk of the court shall issue a writ of garnishment.

For application for writ of garnishment, the compiler annotations refer to Form 4-805 SCRA 1986, modified as adopted November 6, 1995, effective January 1, 1996. This form set forth the necessary recitations mandated by the legislature, with the exception "(application must be swom to unless signed by and attorney)". This provision in Form 4-805, which waives the jurat unless signed by an attorney, is in direct conflict with NMSA 35-12-1(B) which states in part:

> 35-12-1. GARNISHMENT; AFFIDAVIT AND BOND; GROUNDS
> B. Garnishment may be issued in aid of execution of judgment entered in a civil action in the magistrate court only upon the filing in the action of an affidavit of the plaintiff that the defendant has no property in his possession within this state subject to execution to satisfy the judgment.

In all statutes, the Legislature is precise in who must file the affidavit. In NMSA 35-12-1, it is the plaintiff, and only the plaintiff, that may file the affidavit. Compare the language of NMSA 35-12-1 with NMSA 42-8-5, Affidavit (Before the writ of replevin is issued, the plaintiff or some creditable person in his stead shall file in the district court an affidavit stating:...); NMSA 42-8-16, Form of affidavit (AFFIDAVIT IN REPLEVIN. I, (plaintiff or attorney), being duly swom...); NMSA 42-9-5, Affidavit; requirements (The affidavit shall be made by the plaintiff, or some person for him,...).

Had the Legislature wished the plaintiff OR his attorney to sign the affidavit, or simply the plaintiff's attorney, then NMSA 35-12-1 would have been expressly worded as such. It is settled law in New Mexico that compliance with NMSA 35-12-1 is essential to confer upon the court jurisdiction of the res, and the supervisory power of the Judicial branch cannot be exercised when an express jurisdictional provision has been provided by the Legislature.

State constitutions are not grants of power to the legislative, executive or judiciary branches, but are limitations on the powers of each, and no branch may add to, nor detract from, its clear mandate. State ex rel. Hovey Concrete Prods. Co. v. Mechem, 63 N.M. 250, 316 P.2d 1069 (1957). The legislature makes, the executive executes and the judiciary construes the laws, State v. Fifth Judicial Dist. Court, 36 N.M. 151, 9 P.2d 691 (1932), and one branch of the state government may not exercise powers and duties belonging to another. State ex rel. State Corp. Comm'n v. McCulloh, 63 N.M. 436, 321 P.2d 207 (1957). Where a rule issued under the supervisory power of the Judicial branch is in conflict with the provisions of a wholly statutory proceeding, the rule must fail as the constitutional power for enacting legislation is vested exclusively with the Legislature.

E. UNCONSTITUTIONAL EXERCISE OF POWER BY THE NEW MEXICO SUPREME COURT IS IN VIOLATION OF THE REPUBLICAN FORM OF GOVERNMENT

Doctrine of separation of powers is inherent and integral element of republican form of government, and separation of powers, as

element of the republican form of government, is expressly guaranteed to the states by Article IV, s 4 of the Constitution of the United States, Vansickle v. Shanahan, 212 Kan. 426, 511 P.2d 223, and one branch of the government may not exercise powers and duties belonging to another, State ex rel. State Corp. Comm;n v. McCulloh, 63 N.M. 49, 321 P.2d 207 (1957). Here, the New Mexico Supreme Court has encroached on the power of the Legislature by abrogating the affidavit requirement of NMSA 35-12-1 under the apparent guise of regulating procedure. This unprecedented usurpation of power is repugnant to Article III of the N.M. Constitution and Article IV s 4 of the U.S. Constitution.

F. DEPRIVATION OF PROPERTY THROUGH ARBITRARY EXERCISE OF POWER IS REPUGNANT TO 14TH AMENDMENT DUE PROCESS

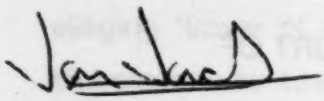
Deprivation of property without due process of law within meaning of Fourteenth Amendment occurs when it results from arbitrary exercise of power inconsistent with those settled usages and modes of proceeding existing in common and statute law of England, Tracy v. Ginzberf, 205 U.S. 170 (1907). Here, the district court has issued sanctions against Petitioner, where the court has no jurisdiction to proceed in any manner due to the lack of the prerequisite affidavit. Where jurisdiction is denied and squarely challenged, jurisdiction cannot be assumed to exist "sub silentio", but must be proved. Hagans v. Lavine, 415 U.S. 533 n.5; Monnel v. N.Y., 436 U.S. 658; U.S. v. More, 3 Cr. 159, 172. Jurisdiction was continually challenged by Petitioner throughout these proceedings, and the question of

jurisdiction was expressly raised in the N.M. Appellate Courts in their Certification To The Supreme Court. The Supreme Courts affirmance of sanctions without addressing the question of jurisdiction amounts to the deprivation of property without due process of law, Daniels v. Williams, 474 U.S. 327, 339 (1986), and is repugnant to Article II, s 18 of the N.M Constitution and 14th Amendment due process of the U.S. Constitution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,



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Dated: August 23, 1997

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: _____

Docket No. 23,676

Jon Barton Jacob,

Plaintiff-Appellant,

vs.

METROLASER, INC. , and

CECIL HESS, President,

Defendants-Appellees.

CERTIFICATION FROM THE NEW MEXICO COURT OF APPEALS

Burt Cosgrove, District Judge

Jon Barton Jacob

Albuquerque, NM

Pro Se

Guebert & Yoemans, P.C.

Richard Yoemans

Albuquerque, NM

For Appellees

AMENDED DISPOSITIONAL ORDER OF DISMISSAL

The above-entitled and numbered appeal, having come on for conference before a panel of three members of the Court, each panel member having read the briefs of the parties and otherwise becoming fully informed on the issues and applicable law as raised, briefed, and argued by the parties; and

Each of the justices constituting the adjudicative quorum of the Court having concurred that there is no reasonable likelihood that a written rationale would affect the decision of the Court or advance the law of the State:

IT IS ADJUDGED that:

1. Plaintiff-Appellant in the present case, Jon Jacob, brought suit against Metrolaser, Inc., approximately a year and a half ago alleging "trover of conversion." The claim was dismissed and Metrolaser was awarded sanctions against Jacob in the amount of $7,200. Although this amount was eventually paid by Jacob and is not at issue in this appeal, this Court now is asked to review the propriety of the issuance of the writ of garnishment sought by Metrolaser to secure the $7,200.
2. Defendants-Appellees Metrolaser, Inc., and Cecil Hess, President (collectively "Metrolaser") applied for a writ of garnishment on February 27, 1996. The application was signed by counsel of record for Metrolaser, but no affidavit was submitted in connection with the application. The court granted the writ that day.

3. Garnishee Decade Optical Systems (Decade) was served with the writ on the following day, February 28, 1996. Before Metrolaser received a response from Decade regarding the writ, Jacob filed a Motion to Vacate Writ of Garnishment. He argued that both Rule 1-065.1(H) NMRA 1997, and NMSA 1978, Section 35-12-1 (1969), require that an affidavit "accompany any garnishment proceedings" and that, by not submitting an affidavit, Metrolaser had perpetrated a fraud on the court. Jacob sought nullification of the writ and sanctions against Metrolaser. Metrolaser filed an answer contesting these arguments and also seeking further Rule 11 sanctions against Jacob.
4. On April 9, 1996, a hearing was held on Jacob's Motion to Vacate Writ of Garnishment. The district court denied the Motion.
5. On April 11, 1996, the district court granted judgment against Jacob. The court found no merit in Petitioner's arguments concerning the alleged affidavit requirement. Furthermore, the court granted Metrolaser's petition for additional sanctions against Jacob, fining him $3,500 in addition to the $7,200 sanction filed in September.
6. The doctrine of mootness limits jurisdiction or decrees in cases where no actual controversy exists. See Mowrer v. Rusk, 95 NM 48, 51, 618 P.2d 886, 889 (1990). Generally, a case will be dismissed if deemed moot. Id. However, moot issues will be decided if they are issues of substantial public interest and capable of repetition, yet evading review. See Howell v. Heim, 118 NM 500, 503, 882 P.2d 541, 544 (1994).
7. The record does not indicate an existing controversy regarding the affidavit issue presented by Jacob. On April 9, 1996, at the

time that the district court denied Jacob's Motion to Vacate Writ of Garnishment, Garnishee-Decade stated that it did not owe Jacob any money and that it had no property belonging to him in its possession. Thus, no money or property was subject to the writ. Furthermore, no other writs of garnishment were outstanding, nor were any being sought. Thus, Petitioner's claim regarding the propriety of the writ is now moot.

8. Furthermore, the record suggest that this issue does not meet the exception to the mootness doctrine. While Jacob's contention regarding the requirement of an affidavit in seeking writs of garnishment is arguably of substantial public interest, nothing suggest that this question, if brought before the courts again, is likely to evade review. See Howell, 118 NM at 503, 882 P.2d at 544.

9. The issuance of additional sanctions against Jacob in the amount of $3,500 does not constitute an existing controversy in this instance. It is well established that issues listed in a docketing statement which are not argued are deemed abandoned. See State v. McGill, 89 NM 631, 632, 556 P.2d 39, 40 (Ct. App. 1976); accord State v. Sandoval, 90 NM 260, 261, 561 P.2d 1353, 1354 (Ct. App. 1977). Although Petitioner mentioned the Rule 11 sanctions in his Docketing Statement, neither the Docketing Statement nor the Memorandum in Opposition to Calendar Assignment include any argument regarding the issuance of Rule 11 sanctions by the district court. Because no arguments on this issue were presented to the Court of Appeals for review, the issue is deemed abandoned.

NOW, THEREFORE, THE APPEAL IS DISMISSED.

IT IS SO ORDERED.

/s/ Gener E. Franchini, Chief Justice

/s/ Joseph F. Baca, Justice

/s/ Pamela B. Minzner, Justice

Dated July 3, 1997

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Jon Barton Jacob,

Plaintiff-Appellant

vs. No. 17,318

METROLASER, INC., CECIL HESS, PRESIDENT,

Defendant-Appellee.

CERTIFICATION TO THE SUPREME COURT

This matter having come before this Court upon its own motion, it appears as follows:

1. The statute governing garnishment requires the filing of an affidavit of the plaintiff before a writ may be issued. See NMSA 1978, s 35-12-1 (Repl. Supp. 1988).
2. The Supreme Court recently amended its rule on garnishment to allow issuance of a writ of garnishment "upon application of the judgment creditor." See SCRA 1986, 1-065.2 (Advance Ann. & Rules Serv., March, 1996) (Effective January 1, 1996). The form approved by the Supreme Court for application for writ of garnishment requires that the application be sworn to by the judgment creditor unless the application is signed by an attorney. See SCRA 1986, 4-805. By allowing an attorney's signature to substitute for an affidavit, the amended rule and form appears to change the statutory requirement that a sworn affidavit from the plaintiff be filed with the application for writ of garnishment.

3. A question exists as to whether the statutory requirement of a sworn affidavit from the plaintiff is jurisdictional. See Upjohn Co. v. Board of Comm'rs of Socorro County, 25 N.M. 526, 533, 185 P. 279, 286 (1919) (garnishment is wholly statutory and compliance with statute is essential to confer upon a court jurisdiction over res); see also Insurance Co. of North America v. Issett, 269 N.W. 2d 301, 303 (Ct. App. Mich. 1978) (absence of affidavit supporting writ of garnishment is jurisdictional defect); but see Sherry Lane National Bank v. Bank of Evergreen, 715 S.W.2d 148, 151 (Tex. App. 1986) (absence of affidavit supporting writ of garnishment is not jurisdictional).
4. This case involves an issue of substantial public interest in that garnishment is a frequently used method for collecting on judgments. See NMSA 1978, s 34-5-14 (Re[;/ Pamp. 1990). It is important that the correct method of obtaining a writ of garnishment be determined by the Supreme Court.

IT IS THEREFORE ORDERED that the above-entitled case be certified to the Supreme Court for decision.

/s/ Unintelligible Signature, Judge
/s/ Unintelligible Signature, Judge

Dated May 30, 1996

APPENDIX C

IN THE COURT OF APPEALS FOR THE STATE OF NEW MEXICO

Jon Barton Jacob

Plaintiff-Appellate,

vs.

No. 17,318

Bernalillo County

CV-95-366

METROLASER, Inc.

Cecil Hess

Defendant-Appellee

MEMORANDUM IN OPPOSITION TO CALENDAR ASSIGNMENT

Pursuant to New Mexico Rules of Appellate Procedure 12-210(D)(3), Plaintiff-Appellate Jon Barton Jacob submits this memorandum setting forth the reasons why the proposed disposition should no be assigned to the summary calendar.

ISSUE 1. Garnishment is a wholly statutory procedure in New Mexico.

Garnishment is a specialized form of attachment which allows a person to satisfy a debt owing him from property of his creditor which is in the possession of a third party. Garnishment was not a remedy that existed at common law and in New Mexico the scope of the remedy is purely statutory. Report of the Attorney General, Attorney General Opinion No. 69-85 (August 4, 1969), Joe v. Marcum, 621 F.2d 358 (10th Cir 1980). It is settled law in New Mexico that a proceeding in garnishment is wholly statutory, and

that compliance with the applicable statutes is essential to confer upon the court jurisdiction of the res, Upjohn Co. v. Board of Commissioners, 25 N.M. 526, 185 P. 279, Farmers Ins. Exchange v. Ledesma, 214 F.2d 495 (1954), and that garnishment proceedings are controlled by statutes NMSA 1978 Section 35-12-1 to -19 (Orig. Pamp. & CummSupp. 1986), Jemko, Inc. v. Liaghat, 106 N.M. 50, 738 P.2d 922 (N.M. App 1987).

Garnishment may be issued in the aid of judgment entered in a civil action only upon the filing in the action of an affidavit stating: that the defendant has no property in his possession within this state subject to execution to satisfy the judgment, NMSA 35-12-1(D)(1); and that named garnishee holds personal property belonging to the defendant, NMSA 35-12-1(D)(2).

ISSUE 2. New Mexico Supreme Court has no jurisdiction to modify the substance of a wholly statutory procedure.

Effective January 1, 1996, the NM Supreme Court adopted Rule 1-065.2 relating to garnishment, which in part states:

> After the filing of the judgment on the underlying dispute and upon application of the judgment creditor, the clerk of the court shall issue a writ of garnishment. 1-065.2(A)

The NM Supreme Court has the power to promulgate rules regulating pleading, practice and procedures through art. 6, s 3 of the N.M. Constitution, which grants the judiciary "superintending control" over all inferior courts. Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 551 P.2d 1354 (1976). However, the power to make law is reserved exclusively to the legislature, and any attempt to abdicate it in any particular field, though valid in form, must necessarily be held void. State v. Roy, 40 N.M. 397, 60 P.2d

646, 110 A.L.R. 1 (1936). Courts are not free to construe unambiguous legislation; they may not read language into a statute that is not there, Hansman v. Bernalillo County Assessor, 95 N.M. 697, 625 P.2d 1214 (Ct. App. 1980), nor may they ignore an express provision.

Examples of procedural rules include rules of evidence, Ammerman v. Hubbard Broadcasting, Inc., and time limitation, State v. Doe, 566 P.2d 117, 90 N.M. 568 (Ct. App. 1977). Garnishment is a statutory procedure controlled by statutes, Jemko, Inc. v. Liaghat, and strict compliance with the applicable statutes are essential to confer upon the court jurisdiction of the res, Upjohn Co. v. Board of Commissioners. Garnishment statutes are not procedural, but jurisdictional, and any rule adopted by the NM Supreme Court in conflict with these statutes must necessarily be held void.

ISSUE 3. Unconstitutional exercise of power by N.M. Supreme Court is in violation to the separation of powers.

Doctrine of separation of powers is inherent and integral element of republican form of government, and separation of powers, as element of the republican form of government, is expressly guaranteed to the states by Article IV, s 4 of the Constitution of the United States, Vansickle v. Shanahan, 212 Kan. 426, 511 P.2d 223, and one branch of the government may not exercise powers and duties belonging to another, State ex rel. State Corp. Comm;n v. McCulloh, 63 N.M. 49, 321 P.2d 207 (1957). Here, the Supreme Court has encroached on the power of the Legislature by abrogating the affidavit requirement of NMSA 35-12-1 under the apparent guise of regulating procedure. This usurpation of power is repugnant to

Article II of the N.M. Constitution and Article IV of the U.S. Constitution.

ISSUE 4. Deprivation of property through arbitrary exercise of power is repugnant to the U.S. Constitution 14th Amendment due process. Deprivation of property without due process of law within meaning of Fourteenth Amendment occurs when it results from arbitrary exercise of power inconsistent with those settled usages and modes of proceeding existing in common and statute law of England, Tracy v. Ginzberf, 205 U.S. 170 (1907). Here, the District court has issued a purported JUDGMENT based on an arbitrary exercise of power in an attempt to deprive Plaintiff of his property. This is repugnant to Article II, s 18 of the N.M. Constitution and the 14th Amendment due process of the U.S. Constitution.

Sui Juris,

/s/ Jon Barton Jacob Dated: May 14, 1996

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